

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CLIFTON J. BECKLEY,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
NY07528910232

DATE: FEB - 7 1990

Clifton J. Beckley, East Orange, New Jersey, pro se.

Michael Melchionda, Jr., Jersey City, New Jersey, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of an initial decision issued April 12, 1989, that dismissed for untimeliness his February 23, 1989, appeal from the agency's action removing him, effective January 23, 1989, from his position of Distribution Clerk. For the reasons discussed below, the petition for review is DISMISSED as untimely filed.

BACKGROUND

In its decision letter, the agency notified the appellant of the time limit for filing an appeal and the address of the Board's office. See Initial Appeal File (IAF), Tab 6(5). The appellant explained that his appeal was filed untimely because he changed representatives from an attorney to a union representative. However, the administrative judge found that the appellant failed to explain why the appeal could not have been filed on time and the designation of representative made at a later time. See Initial Decision at 3. She concluded that the appeal was untimely and since good cause was not shown for the untimely filing, she dismissed the appeal. See *id.*

The initial decision informed the appellant that he could obtain review of the decision by filing a petition for review with the Board before May 17, 1989, the date on which the initial decision would become final. See *id.* On May 15, 1989, the appellant filed a petition for review that was returned to him because he failed to serve the opposing party and the designated representative and he did not attach a certificate of service. See Petition for Review File, Tab 2. In its May 24, 1989, notice returning the petition for review, the Board informed the appellant that he could refile his petition for review, with the deficiencies corrected, within 15 days, or by June 8, 1989. See *id.*

The appellant refiled his petition for review, with the deficiencies corrected, on July 27, 1989, seven weeks

after the expiration of the time limit provided by the Board. See *id.*, Tab 3. By notice dated August 10, 1989, the appellant was directed to show cause within ten days for filing the petition for review beyond the 15-day time limit set forth in the May 24, 1989, notice, and to provide a motion for waiver of the time limit, together with an affidavit or statement, signed under the penalty of perjury, stating why there was good cause for the late filing. See *id.*, Tab 4.

The appellant filed a timely reply.¹ In his reply, the appellant states that he did not receive the May 24, 1989, order until a month and a half after it was mailed, and he encloses a letter from the Postal Service apparently in response to a complaint he filed. See *id.*, Tab 5.

ANALYSIS

The Board may extend the time limit for filing a petition for review where good cause is shown for the untimeliness. See 5 C.F.R. § 1201.113(d). See also *Shiflett v. United States Postal Service*, 839 F.2d 669, 670-74 (Fed. Cir. 1988).

¹ Since the tenth day from August 10, 1989, was August 20, a Sunday, the reply had to be filed by Monday, August 21, 1989. See 5 C.F.R. § 1201.23; *Hughes v. U.S. Commission on Civil Rights*, 26 M.S.P.R. 277, 278 (1985) (if the last day for filing falls on a Saturday, Sunday, or Federal holiday, the first working day thereafter shall be the last day for timely filing). The appellant's reply to the August 10 show cause notice, mailed in an unpostmarked envelope, is presumed to have been filed on August 19, 1989, five days prior to the August 24, 1989, date of receipt, and, therefore, is timely. See 5 C.F.R. § 1201.22(b); *Dickinson v. Department of Energy*, 3 M.S.P.R. 240, 244 (1980) (an unpostmarked petition for review received by the Board after the filing deadline would be presumed, absent other evidence, to have been mailed five days prior to the date of receipt).

However, in the interest of judicial efficiency and fairness, regardless of how minimal the delay, the Board will not waive its timeliness requirements in the absence of good cause. See *Stromfeld v. Department of Justice*, 25 M.S.P.R. 240, 241 (1984) (a petition for review filed one day late was not excused where the appellant offered no reasonable excuse for the delay).

In *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980), the Board set out some of the factors to be considered in determining whether an appellant has established good cause for an untimely filing of a petition with the Board. We find that the appellant here has not shown good cause for the untimely filing of his petition for review.

While the appellant claims that he did not receive the May 24, 1989, order until a month and a half after it was mailed, and encloses the reply from the Postal Service, he fails to comply with the Board's requirements, set forth in the August 10 notice, that his request for a waiver of the time limit be accompanied by an affidavit or statement, signed under the penalty of perjury.² See *id.*, Tab 4; 5 C.F.R. § 1201.114(e) and (f). Nor was any proof of the claim filed.

² We also note that the appellant did not submit any evidence to support his claim that he did not receive the May 24, 1989, notice for a month and a half after it was mailed. Moreover, the letter from the Postal Service requested the appellant to bring in the envelope so that a determination could be made of the cause for the delay, suggesting that the Postal Service's reply was not based upon evidence submitted by the appellant. See Petition for Review File, Tab 5.

Under the circumstances, we find that good cause has not been shown for the late filing of the petition for review.³ See *Williamson v. Veterans Administration*, 40 M.S.P.R. 4, 7 (1989) (the Board found that good cause was not shown for extending the time limit for filing a petition for review where, inter alia, the motion for waiver was not in affidavit form and was submitted without any supporting evidence).

ORDER

This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision dismissing the appeal as untimely will remain the final decision of the Board with regard to the timeliness of the petition for appeal.

NOTICE TO APPELLANT


You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

³ Even if the petition for review had been timely, the appellant has not shown error in the administrative judge's dismissal of the petition for appeal for untimeliness. See *Nabors v. United States Postal Service*, 31 M.S.P.R. 656, 659 (1986), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table) (that the employee did not have information and representation needed to proceed did not constitute good cause for untimely filing of an appeal).

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.